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(1987) 05 CAL CK 0011

In the Calcutta High Court

Case No : C.O. No. 10344 (W) of 1986

Tarak Nath Gayen and Others — APPELLANT

Vs

Customs, Excise and Gold (Control) Appellate Tribunal and Others — RESPONDENT

Date of Decision : 07-05-1987

Acts Referred:
Gold (Control) Act, 1968 — Section 21, 27(1), 41, 55, 74
Gold Control (Reforms, Fees and Miscellaneous Matters) Rules, 1968 — Rule 11

Citation : (1987) 31 ELT 631

Hon'ble Judges : Suhas Chandra Sen, J

Bench : Single Bench

Advocate : Nanilal Banerjee, for the Appellant;R.K. Lala and Sunil Chatterjee, for the Respondent

Judgement

Suhas Chandra Sen, J.—Mrigendra Nath Gayen with his brother Debendra Nath Gayen and Sri Tarak Nath Gayen and Niranjan Gayen used to live in a house at Patna Bazar, District: Midnapur, West Bengal. Mrigendra Nath Gayen, Debertdra Nath Gayen, Tarak Nath Gayen and Niranjan Gayen were all members of a joint family. The house was a joint family property and was utilised for the purpose of residence as well as business premises.

2. The Gayens were! engaged in the business of gold smithy and held a licence for this purpose issued under the Gold Control Act.

3. On 4th March, 1978 there was a search by the Gold Control Authority and gold and god ornaments were seized by the Gold Control Officers on the allegation that the provisions of the Gold Control Act, had been violated. Proceedings for imposition of penalty and confiscation of the gold that was seized was initiated by the Gold Control Officers against Debendra Nath Gayen, Tarak Nath Gayen and Niranjan Gayen. No proceeding was taken against Mrigendra Nath Gayen who was the head of the joint family. Mrigendra Nath Gayen died on 19-12-1982 after the adjudication proceedings pursuant to the seizure case was decided. Debendra

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Nath Gayen died on 11th February, 1982 during the pendency of the appeal before the Appellate Tribunal against the order passed in the adjudication proceedings.

4. In the affidavit of Subhas Chandra Chowdhury, the Deputy Collector of Central Excise (Gold), Calcutta-II affirmed on 12th December, 1986 it has been stated that gold and gold ornaments weighing 738.102 gms, valued at Rs. 44,2 78/- were seized on the ground that the gold and the gold ornaments belonged to the business of the Gayens for which statutory books of account j could not be produced. The show cause notice that was issued on 26-6-1978 by the Deputy Collector of Central Excise alleged that Sections 55, 41(b) and 27(1) had been violated by Tarak Nath Gayen, Niranjan Gayen and Debendra Nath Gayen, certified goldsmith of Patna Bazar. The allegation was non-maintenance of true and complete accounts in the G.S. 13 Register in respect of the primary gold assorted new gold ornaments, broken gold ornaments bronze based gold choories and gold soverings weighing altogether 728.102 gms collectively valued at Rs. 44,2 78/- owned, possessed, held, controlled bought, acquired or accepted or otherwise received by them which were recovered and seized from their workshop-cum-reisidential premises at Patna Bazar on 4-3-1978. There was similar allegation also in respect of 161 Tolas 10 Anas and 3.5 paisa or 1939.806 gms of gold and gold ornaments valued at Rs. 1,26,806/- and also 314 Tolas 10 Anas and 3 paisa or 3,670.283 gms of gold and gold ornaments valued at Rs. 2,38,568/-.

5. This according to the show cause notice constituted violation of Section 55 of the Gold Control Act, 1968 read with Rule 11(c) of Gold Control (Forms, Fees and Misc. Matters) Rules, 1968. The period during which violation took place was alleged to be 1381 B.S. to 1384 B.S.

6. The second allegation was that Tarak Nath Gayen, Niranjan Gayen and Debendra Nath Gayen had bought the aforesaid primary gold, gold ornaments and gold soverings etc. during the period 1381 B.S. to 1384 B.S. in violation of Section 41(b) of the Gold Control Act, 1968.

7. The third allegation was that Tarak Nath Gayen, Niranjan Gayen and Debendra Nath Gayen had commenced or carried on business as dealer in gold in respect of primary gold, gold ornaments and gold soverings during the period 1381 B.S. to 1384 B.S.

8. Tarak Nath Gayen, Niranjan Gayen and Debendra Nath Gayen were jointly and severally called upon to show cause to the Collector of Central Excise, Calcutta as to why the primary gold, gold articles and gold ornaments under seizure should not be confiscated u/s 21 of the Gold Control Act, 1968 and also why penalty should not be imposed on each of them u/s 74 of the Gold Control Act, 1968, for contravention of the provisions of the aforesaid sections.

9. It is to be noted that it is not the case of the Department that Tarak Nath Gayen and Niranjan Gayen were the owners of the house property from which

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the aforesaid seizure of gold and gold ornaments were made. It is not even the case of the respondents that the business stood in the names of the two sons or jointly in the names of the two sons along with their father and uncle, Mrigendra Nath Gayen and Debendra Nath Gayen. According to the Department, the aforesaid unlawful activities were being carried on for three years, 1381 B.S. to 1384 B.S. Strangely enough, no action was taken against Mrigendra Nath Gayen. The show cause notice was confined only to Debendra Nath Gayen and Tarak Nath Gayen and Niranjan Gayen.

10. Debendra Nath Gayen, Tarak Nath Gayen and Niranjan Gayen sent their replies to the show cause notices. Those were also heard by the Collector of Central Excise, who by an order dated 22-5-1980, held that -

"In view of what has been stated above I hold that the theory of seized gold and gold ornaments articles belonging to the various customers and the family members is an afterthought and baseless. Since the unauthorised transactions entered in the private account books do not appear in the G.S. 13 it is obvious that the parties are dealing as a dealer.

As such charges levelled against the parties in the show cause notices are conclusively proved. 1, therefore, order confiscation of the gold and gold ornaments and gold articles valued at Rs. 44,278.00. So far as the primary gold is concerned 1 order absolute confiscation of the same. However, in respect of the gold ornaments and articles, 1 allow the parties (viz. S/Sri Tarak Nath Gayen, Niranjan Gayen, Debendra Nath Gayen) to redeem the same on payment of fine of Rs. 32,000.00 (Rupees thirty-two thousand only).

Further since the aforesaid three persons have been indulging in unauthorised transaction in gold and gold ornaments and have been working as a dealer, 1 impose a penalty of Rs. 2 lakhs (Rupees two lakhs only) jointly and severally on the aforesaid three persons for contravention of the various provisions of the Gold (Control) Act as mentioned in the show cause notice. Unless deterrent action is taken, the trafficking in smuggled gold which is immediately melted for sale and manufacture of ornaments without observing the provisions of the Gold (Control) Act, 1968 land without paying and Sales Tax and Income Tax will be difficult to check".

11. In appeal the Tribunal took the view :-

"As Shri Mrigendra Nath Gayen was head of the family and a certified goldsmith | and the business was the joint family business and Shri Mrigendra |Nath Gayen had not been served with any notice, we hold that the entire quantity of gold (including primary gold articles and ornaments) is required to be returned to the appellants. It is ordered accordingly.

In view of this position, it is not necessary to consider other submission regarding gold seized.

At the same time, we observe that admittedly and accounts were not properly

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maintained. In this connection, the statement of Shri Debendra Nath Gayen, Shri Thaneswar Gayen and Shri Niranjan Gayen, given on the date of seizure, is of crucial importance. The admission as made therein, is further corroborated by the submission made during the personal hearing before the Collector and clearly indicates that the appellants were fully and clearly responsible for violation of Section 55 of the Gold Control Act.

That the fact Shri Mrigendra Nath Gayen and Shri Debendra Nath Gayen are no longer alive, does not in any way alter and/or effect the seriousness of the share of responsibilities of the three appellants in the eyes of law. Therefore, we consider that they have been rightly held as liable to penalty.

However, looking into the facts and circumstances as a whole including the joint abilities and responsibilities of these three appellants, we consider that only a penalty of Rs. 25,000/- (Rupees twenty five thousand only) each was sufficient. Accordingly, the penalty is reduced from Rs. 2 lakhs to Rs. 75,000/- (Rupees seventy five thousand only). The order of the Collector is modified to this extent so far as penalty is Concerned."

12. The first point urged on behalf of the petitioners is that Debendra Nath Gayen died before penalty could be realised from him. Therefore, there cannot be any question of recovery of penalty so far as Debendra Nath Gayen is concerned.

13. On behalf of the respondents, it was argued that the order of penalty was passed before the death of Debendra Nath Gayen and, therefore, the order cannot be disturbed on the ground of death of Debendra Nath Gayen subsequent to the passing of the order and the order is enforceable against the legal representatives.

14. I am of the view that the order of penalty was imposed u/s 55 with a view to punish Debendra Nath Gayen. Section 74 creates a liability to penalty for any act or omission of a person in relation to any gold which would render such gold liable to confiscation. The liability is for penalty not exceeding five times the value of the gold or Rs. 1,000/-whichever is more whether or not such gold has been confiscated or is available for confiscation!.

15. Now that Debendra Nath Gayen is dead, there cannot be any question of realising the amount of penalty from the legal representatives of Debendra Nath Gayen. That will amount to punishing the legal representatives. This is not a case where a debt has come into existence as a result of the order imposing penalty. The object of imposing penalty was to penalise Debendra Nath Gayen. That object will not be achieved by realising the amount of penalty from the assets left behind by Debendra Nath Gayen.

16. My attention was drawn to an order passed by the Government of India in the case of Mainly Glass Works Private Limited, Nainy, 1982 E.L.T. 644 where the view was expressed that there was no question of recovery of penalty if the

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person concerned had passed away before the recovery of the penalty.

17. Therefore, even if the order imposing penalty is sustained, the amount of penalty imposed on Debendra Nath Gayen cannot be recovered by the Department from the legal representatives of Debendra Nath Gayen.

18. The next question is about the justifiability of the order of penalty upon three of the persons who were allegedly involved in this case. The allegation is that the books were not properly maintained in regard to the gold. It is difficult to see how the Tribunal could absolve the writ petitioner Nos. 1 and 2 from the charges relating to unlawful possession of gold and yet hold that the gold was not properly accounted for in the books of accounts and sustain the order of penalty. It has been held by the Tribunal that because Mrigendra Nath Gayen, the head of the family, was not served with a show cause notice, the proceeding for confiscation in respect of the entire quantity of gold had to be quashed.

19. The position is similar in the case of penalty proceedings. No case has been made out against Mrigendra Nath Gayen. It has been held that the business was a joint family business. The accounts according to the show cause notice relates to 1381 B.S. - 1384 B.S.

20. In course of the hearing it was strongly argued that having decided to quash the proceedings for confiscation of gold in view of non-service of notice upon Mrigendra Nath Gayen, the Tribunal should have also quashed the penalty proceedings on the same ground. Initially in course of the hearing 1 was inclined to uphold this contention. But on a careful examination of the facts of the case, however, I am of the view that the Tribunal has taken a correct decision in this case. That the business was being jointly run by Mrigendra Nath Gayen, Debendra Nath Gayen, Tarak Nath Gayen and Niranjan Gayen cannot be denied. The fact that the accounts have not been properly maintained for the years 1381 B.S. to 1384 B.S. cannot also be denied. It is not the case of Tarak Nath Gayen and Niranjan Gayen that they were not responsible for the maintenance of the accounts. As licensed goldsmiths they had to maintain accounts in accordance with law. Therefore, taking an overall view of the matter, 1 am disinclined to interfere with this aspect of the order of the Tribunal especially in view of the fact that the quantum of penalty has been reduced by the Tribunal.

21. Therefore, this writ petition is disposed of by the following order :-

1. The amount of penalty imposed on Debendra Nath Gayen will not be realised by the respondents in view of the fact that Debendra Nath Gayen has died before realisation of the amount.

2. Tarak Nath Gayen and Niranjan Gayen will remain liable to pay penalty of Rs. 25,000/- each as determined by the Tribunal.

3. By virtue of the interim order passed on 19-8-1986 the petitioners were directed to pay Rs. 25,000/- immediately and also to go on paying Rs. 3,000/- by the 30th of each month. If the total amount of Rs. 50,000/- has not been paid

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the petitioners will pay the balance amount by the 30th of August, 1987 by instalments of Rs. 2,500/- each month. The first instalment will be paid on or before 30th May, 1987 and thereafter on the 30th day of each subsequent month till the entire amount is paid off. In default of payment of any one of the instalments the respondents will be at liberty to proceed in accordance with law. After the last instalment has been paid, the bond furnished by the petitioners will stand discharged.

22. The writ petition is disposed of finally as above.

23. There will be no order as to costs.

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